Supreme Court, U. S.
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No. 80-133

In the Supreme Court of the United States

OCTOBER TERM, 1980

LEVITT & SONS OF PUERTO RICO, INC.,
PETITIONER,

v.

COMMERCIAL INSURANCE COMPANY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioner Levitt & sons of Puerto Rico, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on April 8, 1980, and a further order on Petition for Rehearing entered April 30, 1980.

Question Presented

1. Whether the judgment rendered against the Petitioner, without a trial, or the receipt of any evidence, and based solely on the contested pleading of one of the parties violates the Due Process clause of the Fifth Amendment.

2. Whether the upholding of said judgment by the First Circuit warrants review by this court.

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Opinion Below

The Opinion of the Court of Appeals of April 8, 1980 is unpublished. It appears in the Appendix at page 7. The Opinion of the District Court is unpublished. It appears in the Appendix at page 17.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered on April 8, 1980. A timely petition for rehearing was denied on April 30, 1980. (Appendix B at page 15). This petition for certiorari was filed within nine days of that day. This court's jurisdiction is invoked under 28 U.S.C. 1254(1).

Statement of the Case

This case is brought before this court for review because it involves a bizarre situation in which a court of the United States adjudicated the rights of the parties without a trial, or any sort of evidence whatsoever, solely upon the controverted pleadings of one party. Such action was upheld by the Court of Appeals, and it involves the kind of clear violation of constitutional rights as to call for this court's attention.

The federal jurisdiction in the court of first instance was pursuant to 28 U.S.C. § 1332.

This case arises out of a simple controversy between Levitt and Sons of Puerto Rico, Inc. and Commercial Insurance Companies as to whether a specific agreement had been reached between them during an in-chambers meeting at the District Court.*

The existence of the agreement was formally pleaded to the trial court by Commercial. (Appendix D, page 23).

Levitt answered this pleading and denied as "groundless" (Appendix E, page 25).

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*A summary of the factual background of the litigation has been prepared by this Counsel and included as Appendix G.

The District Court, without setting this controversy for trial, without receiving any evidence whatsoever, entered a judgment and found that as a matter of fact the parties had entered into what it called a "winner-take-all" agreement. As a result of said finding of fact, judgment was entered against Levitt for $34,000.00. (Appendix C, page 17).

Proceedings in the Court of Appeals

The judgment was appealed to the United States Court of Appeals for the First Circuit. There, Levitt stressed in its briefs and through oral argument that the District court had erred in deciding the rights of the parties without a trial, a hearing, in short, without any evidence.

The Circuit Court, in an unpublished opinion, found that "there was solid basis" for the District Court's order that Levitt reimburse Commercial in the amount of $34,000.00 and upheld the judgment. (Appendix A, page 7).

Through a petition for re-hearing (Appendix F, page 27), Levitt pressed again to the Circuit Court that all the proceedings in which its rights had been adjudicated without the benefit of the hearing were contrary to the due process guarantee of the Fifth Amendment. The petition for re-hearing was denied. (Appendix B, page 15).

Reasons for Granting the Writ

The courts below have reached a result that, even on the record, is so grotesque and so contrary to the principles of due process as to justify the supervisory intervention of this court.

In spite of the fact that the existence of the agreement was in controversy and no evidence of any kind was received or called for by the trial court when deciding the issue at bar, the Court of Appeals felt no compunction in upholding the District Court.

The complete disregard by the courts below of the right to an evidentiary hearing as to the matter in dispute demands review by this court.

Argument

As in *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960), the ultimate question presented is whether the judgment rendered against petitioner was totally devoid of evidentiary support, as to render a decision unconstitutional under the due Process clause of the Fifth Amendment. The decision of this question turns not on the sufficiency of the evidence, but on whether the judgment rests upon any evidence at all.

Similar case law illustrative of this problem is not abundant, simply because the notion that all judgments as to contested facts must rest upon evidence is so deeply ingrained in the Anglo-American legal tradition that errors of this kind seldom arise.

When the egregiousness of the mistake was squarely brought to the attention of the Court of Appeals the issue was bypassed by that tribunal by not finding in the record Levitt's pleading which negated the factual allegations of Commercial (Appendix A, at page 14).

When Levitt, upon re-hearing, pointed out to the Circuit Court of Appeals that not only its pleadings had been included in the record, but had also been annexed as an appendix to its reply brief, the Court ended the matter by stating that: "In our opinion, we noted that Levitt's answer had not been included in the record, but also assumed that it denied the agreement. Our opinion did not turn on the absence of the answer to the counter claim, but was based on the substantive arguments advanced by both parties, the facts* and the law". (Appendix B, at pages 15, 16).

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*In the absence of any kind of evidentiary hearing as to the matter in dispute, we simply wonder where the Court of Appeals found those "facts" to uphold the judgment.

The Court of Appeals has negated the right of Levitt to a day in court. Under such circumstances the case should be reviewed and the judgment overruled.

Conclusion

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the First Circuit. The opinion should be vacated and the case be remanded to the trial court for a hearing as to the facts in controversy.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

United States Court of Appeals
For the First Circuit

No. 79-1481

JOSE BERRIOS RIVERA, ETC.,

PLAINTIFFS-APPELLEES,

v.

BRITISH ROPES LTD., ET ALS.,

DEFENDANTS-APPELLEES,

v.

HARNISCHFEGER CORPORATION,

DEFENDANT AND THIRD PARTY PLAINTIFF-APPELLEE,

v.

LEVITT & SONS OF PUERTO RICO, INC.,

THIRD PARTY DEFENDANT-APPELLANT,

v.

COMMERCIAL INSURANCE COMPANY
OF NEWARK, NEW JERSEY,

ADDITIONAL THIRD PARTY DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[HON. JOSE V. TOLEDO, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

David Rive-Rivera, with whom *Calderon, Rosa-Silva & Vargas* was on brief, for appellant.
Charles A. Cordero for appellee.

April 8, 1980

BOWNES, *Circuit Judge*. This case, we hope, closes the book on a personal injury diversity action that started on June 12, 1973. In order to understand the issues, a little background and the lineup of the parties are necessary. Plaintiff, Berrios Rivera, was injured while working as a carpenter for Insular Construction Corporation at a housing development being built by Levitt & Sons of Puerto Rico, Inc. The wire rope of a crane that was pouring concrete broke and the crane bucket fell on Berrios rendering him completely and permanently paralyzed. Berrios' employer, Insular, carried workmen's compensation insurance with the Commercial Insurance Company of Newark, New Jersey, and it paid the benefits due under the Workmen's Compensation Act of Puerto Rico.

Berrios brought suit against the manufacturer of the wirerope, British Ropes Ltd., and Harnischfeger Corporation, the manufacturer of the crane. Harnischfeger brought a third party action against Levitt and Insular. Levitt then brought a third party complaint against Commercial; the basis of the complaint was a hold harmless agreement running fron Insular to Levitt, which Levitt alleged was covered by the insurance contract between Insular and Commercial. In its answer, Commercial denied there was any insurance coverage, alleged that Insular had voided the policy by failing to comply with its conditions and requirements, claimed statutory immunity from suit under the Puerto rico Workmen's Compensation Act because its insured was the employer of the plaintiff, and alleged that the hold harmless agreement was null and void under the common law of Puerto Rico, citing specifically the case of *Chico Ramos* v. *Editorial Ponce, Inc.*, 101 D.P.R. 759 (1973).

A settlement agreement was arrived at by all the parties under which each of the four defendants agreed to pay $34,000 to the plaintiff. Levitt and Commercial unsuccessfully challenged the settlement agreement in the district court and on appeal. *Berrios Rivera* v. *British Ropes Ltd.*, 575 F.2d 966 (1st Cir. 1978). Although joining together in their attack on

the settlement agreement, Levitt and Commercial were careful to reserve for future determination by the district court their claims against each other. *Id.* at 969.

The District Court of Puerto Rico, by opinion of June 28, 1979, held: that the hold harmless agreement was invalid under Puerto Rican law; that even assuming the validity of the hold harmless agreement, Commercial, as the employer's insurer, was immune from suit under the Workmen's Compensation Act of Puerto Rico; and that the reservation of claims agreement between Levitt and Commercial was "one of winner take all." Levitt was ordered to reimburse Commercial for all sums paid to Berrios plus interest from date of judgment and costs. This appeal followed. At issue are the three rulings of the district court.

For the resolution of the validity of Levitt's claim for reimbursement, we must look to Puerto Rican law. The usual deference that a circuit court gives to a district court's interpretation of its own state law is heightened in the case of Puerto Rico because of the knowledge and training that the judges of the District Court of Puerto Rico have in the Spanish language and system of law that is indigenous to the Commonwealth.[1] This deference, however, does not compel us to abdicate our review of state law questions nor accept without careful examination the district court's analysis of the cases decided by the Supreme Court of Puerto Rico.

We disagree with the district court that, even if the hold harmless clause is valid, Levitt's claim is barred because Commercial's insured, the contractor-employer, was immune from suit under the Workmen's Compensation Act. In our opinion, the hold harmless clause is the key to Levitt's claim; if it is applicable and valid, it can recover. This is not a case like *Orza Rentas Vda. de Costas* v. *Puerto Rico Olefins*, 78 J.T.S. 80 (1978) (translation supplied by appellant), relied on by the

[1] We must note that, since 1972, the decisions of the Supreme Court of Puerto Rico have not regularly been translated into English.

district court, where the contractor's injured employee sued the owner of the premises. The court held that payment of the workmen's compensation insurance by the contractor, the subcontractor, the principal, or the owner of the construction project immunized all the employers against damage suits by the employees. In the case at bar, there was no action by the employee against Levitt. Levitt was brought into the case as a third party defendant by the defendants whom the plaintiff had sued. The court in *Puerto Rico Olefins* carefully distinguished *Velez* v. *Halco Sales, Inc.*, 97 P.R.R. 426 (1969), which is very similar to the case before us. In *Halco Sales*, an employee of the contractor building an apartment house was injured when a winch failed to operate properly and he fell to the ground. The contractor had leased the winch and other equipment from Halco Sales. As part of the lease, the contractor agreed to keep the equipment in safe operating condition, assumed all responsibility for claims asserted by any person arising from the maintenance, use, or possession of the leased equipment, and agreed to hold Halco Sales harmless from any liability arising from such claims. When the injured employee sued Halco Sales, it brought an action against the contractor based on the hold harmless agreement in the lease. In arriving at its decision that Halco Sales could recover from the contractor-employer, the Supreme Court of Puerto Rico traced the history and purpose of the workmen's compensation law in the Commonwealth and reviewed the pertinent cases. In the course of its decision, it stated:

> If an employer, knowing the state of the law and the immunity which protects him, in his freedom of contract decides to assume an obligation regarding third persons who might be guilty of the accident, this in no way affects the public policy nor the integrated system of compensation to workmen, provided, as far as the worker and the Fund are concerned, that the provisions of the law, which cannot be modified or altered contractually, be complied with.

97 P.R.R. at 434. We think this reasoning applies here; immunization from suit under the Act does not also immunize an employer from a voluntary and valid hold harmless agreement. Therefore, this case turns on the interpretation and validity of the hold harmless agreement which was not at issue in *Halco Sales*.

The contract between Levitt and Insular provided in pertinent part:

> 13. *Contractor's Liability for Damages.*
>
> The Contractor assumes and shall hold the owner harmless from any liability, loss, or expense incurred because of his operations hereunder, or any act or omission by him, his employees, agents or associates in connection with or during such operations, including, but without limitation to, any liability, loss, or expense incurred by reason of injury, death, or damages to or of persons or property.

The district court found this clause to be null and void because it was vague and ambiguous. We construe it as holding Levitt harmless from acts or omissions of Insular (contractor-employer), its agents, servants and employees. By obtaining workmen's compensation insurance through Commercial, Insular immunized Levitt from suits against it by Insular's employees. *Puerto Rico Olefins, supra*. Insular, therefore, had complied with the hold harmless agreement. To construe the clause, as Levitt urges, to cover the acts or omissions of Levitt and its servants, agents and employees, gives it a meaning at odds with reason and common practice. We agree with the district court that, if the clause br construed to hold Levitt harmless from the consequences of its own acts or omissions, it is rendered nugatory by the holding of the Supreme Court of Puerto Rico in *Chico Ramos* v. *Editorial Ponce, Inc.*, 101 D.P.R. 759 (1973) (translation supplied by appellee):

> Exculpatory clauses are not encouraged. In the past, we have rejected the contractual clauses to exculpate

a priori one of the parties to a contract for the damages subsequently caused to the other contracting party for negligent acts of the first. *Carrasquillo* v. *Am. Missionary Association*, 61 P.R.R. 837 (1943); *Cabrera* v. *Doval*, 76 P.R.R. 728 (1954); see *Rivera* v. *San Juan Racing*, 90 P.R.R. 405 (1964) and also, *Castro* v. *Supermercado de Descuentos*, 90 P.R.R. 826 (1971).

The Civil Code acknowledges the liberty of contract, but sets forth that the will of the contracting parties shall not be at variance with the laws, the morals, or the public order. Article 1207 of the Civil Code, 31 L.P.R.A. § 3372. Article 4 of the same 31 L.P.R.A. § 4, provides that the rights granted by the laws may be waived, provided that said waiver is not contrary to law, to the public interest, or the public order, or prejudicial to the interests of a third party.

The waiver of rights set forth by art. 4 of the Code shall be clear, conclusive, and unequivocal. Even more so when dealing with agreements exculpating a person from liability for its future negligent acts. *Cabrera* v. *Doval*, *supra* at p. 731. We held there—upon reversing the judgment dismissing the complaint for damages rendered on the grounds of a priori release from liability—that:

> It is a universally accepted rule that agreements exempting from liability for negligence are not favored by the law; [citations] and should therefore be strictly construed against the party relying on them to avoid liability, and, if possible, their interpretation should be against exemption. [citations] Clear and explicit language is required in the contract to absolve a person from the consequences of his own neglect. [citations] Some courts maintain, in our opinion with reason, that the language exculpating from liability for negligence should be explicit, either expressly referring to negligence or indicating the intention in unequivocal terms. [citations].

> See, *Contractual Exculpation from Tort Liability in California—The True Rule Steps Forward*, 52 Calif. L. Rev. 350 (1964); 57 Am. Jur.2d, *Negligence*, § 28, pp. 372-373. An important factor for determining the validity of an exculpatory clause depends on the bargaining power of each one of the contracting parties. If they are not on the same footing and power, so that a party is under the obligation to accept the exculpation from liability for negligence of the other party, the clause is null. *Delta Airlines, Inc.* v. *Douglas Aircraft Company*, 47 Cal. Rptr. 518 (1966); *Henningsen* v. *Bloomfield Motors, Inc.*, 161 A.2d 69 (1960); *Donna* v. *Con Edison*, 337 N.Y.S.2d 722 (1972); *Kansas City Power & Light Co.* v. *United Tel. Co. of Kansas*, 458 F.2d 177 (1972).

Since the hold harmless agreement was either inapplicable or invalid, *Halco Sales* does not apply and Levitt's claim against Commercial must fail.

The final matter is Levitt's assertion that, since it had sued Commercial and no counterclaim was brought againt it, Commercial cannot recover anything from it; that it is out-of-pocket $34,000, but has no obligation to reimburse Commercial for its share of the settlement. Based upon the record before us, we cannot say that the district court was clearly erroneous in finding that the parties had agreed to a "winner take all" disposition of their dispute. In arriving at its decision, the district court pointed to part of the settlement order of the court of March 29, 1967:

> Levitt and Sons of Puerto Rico, Inc., and Commercial Insurance Company of Newark, New Jersey agreed to submit for adjudication their claims against each other to this Court by briefs.

The phrase "claims against each other" means that the adjudication agreement was a two-way street, not one-way dead-end, as appellants claim. Moreover, if Commercial's pleadings had been technically defective, they did bring a

"counter complaint" on September 15, 1978, alleging that the agreement between the parties was that the prevailing party would recover $34,000 plus interest from the other. Levitt's answer to this counterclaim has not been included in the record, but we assume that it denied such agreement.

There was a solid basis for the district court's order that Levitt reimburse Commercial in the amout of $34,000 plus interest from the date of judgment.

Affirmed except as to costs.

No costs to either party.

We are not allowing costs because Commercial asserted in its counterclaim that the reservation agreement provided "that neither party would seek attorney's fees or costs from the other." Commercial is bound by its version of the terms of the agreement. For this reason, the costs allowed by the district court are disallowed.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 79-1481

JOSE BERRIOS RIVERA, ETC.,
PLAINTIFFS-APPELLEES,
v.
BRITISH ROPES LTD., ET ALS.,
DEFENDANTS-APPELLEES,
v.
HARNISCHFEGER CORPORATION,
DEFENDANT AND THIRD PARTY PLAINTIFF-APPELLEE,
v.
LEVITT & SONS OF PUERTO RICO, INC.,
THIRD PARTY DEFENDANT-APPELLANT,
v.
COMMERCIAL INSURANCE COMPANY
OF NEWARK, NEW JERSEY,
ADDITIONAL THIRD PARTY DEFENDANT-APPELLEE.

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

ORDER OF COURT
Entered: April 30, 1980

The petition for rehearing is denied. In our opinion, we noted that Levitt's answer had not been included in the record, but also assumed that it denied the agreement. Our

opinion did not turn on the absence of the answer to the counterclaim, but was based on the substantive arguments advanced by both parties, the facts and the law. The petition for rehearing does not add anything new or different.

By the Court:
/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Rive Rivera and Cordero.]

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 528-73

JOSE BERRIOS RIVERA, ET AL.,
PLAINTIFFS,
v.
BRITISH ROPES LTD., ET AL.,
DEFENDANTS,
v.
HARNISCHFEGER CORPORATION,
DEFENDANT AND THIRD PARTY PLAINTIFF,
v.
LEVITT & SONS OF PUERTO RICO, INC.,
THIRD PARTY DEFENDANT,
v.
COMMERCIAL INSURANCE COMPANY
OF NEWARK, NEW JERSEY,
ADDITIONAL THIRD PARTY DEFENDANT.

OPINION AND ORDER

The matter presently before the court involves the aftermath of a settlement of plaintiff's claim, and the disbursement between the defendants, (hereinafter "British Ropes" and "Harnischfeger") and the third party defendant (hereinafter called "Levitt") and the additional third party defendant (hereinafter called "Commercial"). All of the aforesaid defendants effectuated a settlement, and thereafter Levitt and Commercial filed an appeal contesting the settlement. The Appellate Court affirmed the settlement, *Berrios Rivera* v. *British Ropes, Ltd.*, 575 F.2d 966 (1st Cir., 1978). The details of said settlement are summarized in the Appellate Court's decision and need not be repeated here.

Pursuant to the terms of the aforesaid settlement, British Ropes and Harnischfeger paid their respective sums and stipulated that upon payment all disputes against, and between themselves, would terminate. Conversely, Levitt and Commercial stipulated the dispute between them would continue to determine their liability and they would file the corresponding Motion to Dismiss and Motion for Summary Judgment.[1]

The parties have now filed their respective motions, memorandums of law and reply briefs and the court now rules upon the same.

Levitt has filed a Motion for Summary Judgment claiming there is no genuine issue of fact and that judgment must issue in its favor. Indeed, it is undisputed that at the time of the accident, plaintiff Jose Berrios Rivers was employed by Insular Construction Company,[2] (hereinafter called "Insular"), who at that time was insured by its liability carrier, Commercial.[3] Plaintiff suffered an on-the-job accident which was covered by the State Workmen's Compensation Insurance Fund, pursuant to the provisions of law, 11 L.P.R.A. 1, *et seq*. Plaintiff sued

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[1]The settlement, among other matters, compelled a payment to plaintiff of $34,000.00 by Levitt, and a payment of $34,000.00 by Commercial. Obviously, if there is no cause of action against Commercial, or if Commercial is not otherwise liable for any payment, then, Levitt would be compelled to reimburse Commercial the $34,000.00. The record also reflects a clear inference that the agreement between Levitt and Commercial was one of "winner take all", i.e., if Levitt's position were upheld Commercial would reimburse Levitt the $34,000.00, otherwise Levitt would reimburse Commercial $34,000.00. See page 2 of Order of Judge Watson dated March 29, 1977, and page 6 of our Order dated May 31, 1977.

[2]Insular Construction Company is not a party to this action, and has never been before this Court.

[3]It is also undisputed that Levitt was the owner of the project and under the terms of the contract, Insular was required to secure State Workmen's Compensation coverage. Hence, Levitt is a "statutory " employer of plaintiff pursuant to the holding of *Lugo Sanchez* v. *A.F.F.*, (1977) 105 D.P.R. 861, 105 P.R.R. __, while Insular is the "real" employer of plaintiff.

British Ropes and Harnischfeger claiming negligence; a third party action was filed against Levitt, pleadings Levitt's negligence was the proximate cause of the accident. Levitt brought Commercial into this action by way of an additional third party complaint claiming it had a contract with Insular, which contract contained a hold harmless clause in favor of Levitt, and that pursuant thereto Commercial was liable for claims caused by the operations of Insular. Thereafter, Commercial's counter claimed against Levitt for reimbursement of the settlement sums it paid.

Conversely, Commercial filed a Counter Motion for Dismissal claiming that under the applicable law the hold harmless agreement was null and void and that in either event Commercial's insured had employer's immunity pursuant to the specific provision of 11 L.P.R.A., Section 21 and the subsequent interpretation thereof by the Court of Puerto Rico. Furthermore, Commercial argued that since no cause of action against Commercial's insured was available to Levitt, then Levitt's claim against Commercial was likewise non-existent.

In short, this Court is called upon to determine the validity of the hold harmless clause in the contract between Levitt and Commercial's insured, and whether Levitt has a valid action against Commercial.

The Hold Harmless Clause

We must view the validity of the hold harmless clause with the holding of the Supreme Court of Puerto Rico in *Chico Ramos* v. *Editorial Ponce, Inc.*, 101 D.P.R. 759; 101 P.R.R. __, which clearly stated that in this jurisdiction hold harmless clauses are not favored, and that hold harmless clauses must be clear and specific in its language. Furthermore, if a hold harmless clause is overly broad and too engulfing, the Court should void the same as being contrary to public policy. The holding in *Chico Ramos* is essentially the same doctrine followed in the case of *Smith* v. *Chevron Oil Co.*, 517 F.2d 1154 (5th Cir., 1975), which interpreted Louisiana's Civil Code, which contains provisions similar to the Puerto Rico Civil Code.

With that preamble we look at the wording of the disputed clause which reads

> "13. *Contractor's Liability for Damages.*
>
> The contractor assumes and shall hold the owner harmless from any liability, loss or expense incurred because of his operations hereunder, or any act or omission by him, his employees, agents or associates in connection with or during such operations, including, but without limitation to, any liability, loss, or expense incurred by reason of injury, death or damages to or of persons or property."

We find the above clause to be vague. It is not clear if the pronouns *his*, or *him* refer to the employees of Levitt, or to the employees of the sub-contractor (Commercial's insured). If the word *his* and *him* refer to the entire operations of Levitt, then the entire clause is null and void since it is against public interest to, *a priori*, release a principal for his torts, *Chico Ramos*, supra. If the pronoun *his* or *him* refer to the employees of the sub-contractor (Commercial's insured) then all that the sub-contractor has agreed to do is comply with local law and assume liability for its negligence and the negligence of its employees.

In sum, we find that the hold harmless clause is vague and ambiguous, or is otherwise null and void because it attempts to exonerate through indemnity, *a priori*, Levitt for the damages that may be caused by Levitt.[4]

---

[4] Levitt also claims Insular failed to comply with the terms of the contract by not securing insurance for the protection of the "owner" (Levitt), and that Commercial incorporated the hold harmless into its insurance policy. Insular's alleged failure to secure an insurance policy may constitute a breach of contract, but such breach is not covered under Commercial's liability policy, nor does the complaint filed by Levitt make such allegation. Therefore, that issue is not before this Court, and we make no inference as to the validity, if any, of such a claim by Levitt directly against Insular.

THE CLAIM AGAINST COMMERCIAL

Even assuming the validity of the hold harmless clause, Levitt's claim against Commercial cannot be sustained. To begin with, there is no basis for this Court to assume that because Commercial's insured subscribed to the aforesaid hold harmless clause, it thereby waived its right to employer's immunity for work related employee claims as provided in 11 L.P.R.A., Section 21. Levitt cites, in support of its position, the case of *Velez* v. *Halco Sales, Inc.*, 97 D.P.R. 438; 97 P.R.R. 426. At the outset, we note that *Halco Sales, Inc.* was decided long before *Chico Ramos*, and involved a lease agreement between a lessor of scaffolding equipment (Halco Sales) and the third party defendant employer of the injured employee. The suit was filed as a subrogation action by the State Insurance Fund Commissioner against Halco Sales. The validity of the hold harmless was never raised in Halco Sales and therefore that issue was never before the Court. Furthermore, the dispute in Halco Sales did not involve a controversy between a "statutory" employer and the "real" employer as does this case.

Prior to *Halco Sales*, the Supreme Court of Puerto Rico had steadfastly held that the employer had absolute immunity from work related employee claims, whether they were direct actions, or indirect third party actions; *Marcano Torres* v. *Fuentes Fluviales*, 91 D.P.R. 655, 91 P.R.R. (1965); *Cortijo Walker* v. *Fuentes Fluviales*, 91 D.P.R. 170, 91 P.R.R. (1966); *Halco Sales*, therefore, seemed to be a departure from the doctrine of absolute employer immunity and held that a third party can demand indemnity from the employer when there was valid hold harmless clause in a contract. This departure, however, is very limited in scope. Shortly after *Halco Sales*, the Supreme Court of Puerto Rico announced *Chicos Ramos* that hold harmless clauses were to be viewed with disfavor. More recently, the Supreme Court of Puerto Rico, in a case identical to the one at bar, reiterated its doctrine that

the employer has absolute immunity from employee work related claims, and that a hold harmless clause between the statutory employer and the real employer did not constitute a waiver of the employer's immunity;,see *Orza Rentas Vda. de Costas* v. *P.R. Olefins*, 78 J.T.S. 80 (October 20, 1978).

Thus, the Supreme Court of Puerto Rico has distinguished and clarified that a valid hold harmless agreement can be enforced against an employer if the recipient of the hold harmless agreement is neither the "real" employer nor the "statutory" employer.[5] Since it is undisputed Levitt is a statutory employer, it has no cause of action against Commercial's insured, who is the "real" employer.

Since Levitt has no cause of action against Insular, it also lacks a cause of action against Insular's liability insurer, Commercial; *Alonso Garcia* v. *Flores Hermanos Cement Products, Inc.*, Supreme Court of Puerto Rico, October 24, 1978, 78 J.T.S. 91; *Ruiz Rodriguez* v. *Litton Industries*, 428 F. Supp. 1232 (D.P.R., 1977), aff'd 574 F.2d 44 (1st Cir., 1978).

WHEREFORE, in view of the foregoing, it is hereby,

ORDERED, that the Motion for Summary Judgment filed by Levitt be and is hereby DENIED, and it is further;

ORDERED, that the Motion to Dismiss filed by Commercial be and is hereby GRANTED, and it is further;

ORDERED, that Levitt shall reimburse Commercial all sums paid by it to plaintiff, plus interest at the legal rate from the date of entry of this judgment, plus all recoverable costs, and it is further,

ORDERED that the Clerk shall enter judgment in accordance with this Opinion and Order. IT IS SO ORDERED.

San Juan, Puerto Rico, June 28, 1979.

/s/ JOSE V. TOLEDO
JOSE V. TOLEDO
Chief, U.S. District Judge

[5] As would be the case of a non-employee claim.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 548-73

JOSE BERRIOS RIVERA, ET AL.,
PLAINTIFFS,
v.
BRITISH ROPES, LTD., ET AL.,
DEFENDANTS,
v.
HARNISCHFEGER CORPORATION,
DEFENDANT AND THIRD PARTY PLAINTIFF,
v.
LEVITT & SONS OF PUERTO RICO, INC.,
THIRD PARTY DEFENDANT,
v.
COMMERCIAL INSURANCE CO.
OF NEWARK, NEW JERSEY,
ADDITIONAL THIRD PARTY DEFENDANT.

COUNTER COMPLAINT AGAINST LEVITT & SONS OF PUERTO RICO

TO THE HONORABLE COURT:

COME NOW, defendant Commercial Insurance Company of Newark, New Jersey (Commercial) and respectfully sets forth and prays:

1. That Levitt has filed a third party action against Commercial.

2. That defendants to this case, to wit, British Ropes, Ltd., et al; Harnischfeger Corporation; Levitt & Sons of Puerto Rico, Inc.; and Commercial Insurance Company were adjudged to have effected a settlement of this case by this Honorable Court, and said Judgment was affirmed by the First Circuit Court of Appeals.

3. That the above mentioned settlement was to the effect that all defendants to this case would contribute certain specified amounts, and pursuant to said settlement Levitt contributed $34,000.00 and Commercial contributed $34,000.00.

4. That as part of the settlement it was accorded that the dispute between Levitt and Commercial would continue.

5. That as part of the settlement Levitt and Commercial agreed:

(a) that if Levitt was successful in its third party action against Commercial, then Commercial would reimburse Levitt the aforesaid sum of $34,000.00 plus interest that it paid;

(b) that if Commercial was successful in its defense against the claim of Levitt, then Levitt would reimburse Commercial for the aforesaid sum of $34,000.00 plus interest that it paid;

(c) that neither party would seek attorney fees or costs from the other.

6. That the aforesaid understanding was held in chambers before Honorable James T. Watson.

WHEREFORE, it is respectfully prayed that this Honorable Court deny the third party action filed by Levitt, and grant this counter complaint against Levitt, and order Levitt to reimburse Commercial the sum of $34,000.00 plus interest that it paid to plaintiff.

In San Juan, Puerto Rico, this 15 day of September of 1978.

I CERTIFY that I have sent copy of this motion to attorney Ramon Vargas, P.O. Box 2219, Hato Rey, Puerto Rico 00919.

Respectfully submitted,

(s) CHARLES A. CORDERO
CHARLES A. CORDERO
P.O. Box 9213
Santurce, Puerto Rico 00908
Tel: 724-5554

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 528-73

JOSE BERRIOS RIVERA
PLAINTIFFS,
v.
BRITISH ROPES, LTD., ETC.,
DEFENDANTS,
v.
HARNISCHFEGER CORPORATION,
DEFENDANT AND THIRD PARTY PLAINTIFF,
v.
LEVITT & SONS OF PUERTO RICO, INC.,
THIRD PARTY DEFENDANT,
v.
COMMERCIAL INSURANCE CO.
OF NEWARK, NEW JERSEY,
ADDITIONAL THIRD PARTY DEFENDANT.

ANSWER TO COUNTER COMPLAINT

TO THE HONORABLE COURT:

Levitt & Sons of Puerto Rico, Inc. admits paragraphs 1, 2, 3 and 4, but denies all other paragraphs of the Counter Complaint filed by Commercial Insurance Company.

It affirmatively alleges that said Counter Complaint is completely groundless.

WHEREFORE, it is respectfully requested that the Counter Complaint be dismissed.

At San Juan, Puerto Rico; this 14th day of December, 1978.

I hereby CERTIFY that on this same date I have sent copy of the foregoing document to Charles A. Cordero,Esq.,

Box 9213, Santurce, Puerto Rico 00908; Gabriel Hernandez Rivera, Esq., Box 2552, San Juan, Puerto Rico 00903; Jaime Pieras, Jr., Esq., Box 507, Hato Rey, Puerto Rico 00919; Amancio Arias Cestero, Esq., Box 2629, San Juan, Puerto Rico 00903.

CALDERON, ROSA SILVA & VARGAS
Box 2219
Hato Rey, Puerto Rico 00919
Tel. 753-5050
(s) RAMON HUMBERTO VARGAS
RAMON HUMBERTO VARGAS

mtr

APPENDIX F

United States Court of Appeals

For the First Circuit

No. 79-1481

JOSE BERRIOS RIVERA, ETC.,

PLAINTIFFS, APPELLEES,

v.

BRITISH ROPES, LTD., ET ALS.,

DEFENDANTS, APPELLEES,

v.

HARNISCHFEGER CORPORATION,

DEFENDANT AND THIRD PARTY PLAINTIFF, APPELLEE,

v.

LEVITT & SONS, OF PUERTO RICO, INC.,

THIRD PARTY DEFENDANT, APPELLANT,

v.

COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY,

ADDITIONAL THIRD PARTY DEFENDANT, APPELLEE.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

PETITION FOR REHEARING

To the Honorable Court:

INTRODUCTORY STATEMENT

This petition for re-hearing is filed because the judgment entered by this Court rests in the supposed absence from

the record of the most important pleading of Levitt. Its presence, and consequent consideration by this court would have mandated, as a matter of due process of law, the reversal of the judgment of the District Court. Due to the nature of this problem, it was impossible to foresee that the court would not take into consideration that pleading.

ARGUMENT

This appeal involves two issues: First, whether the hold-harmless in favor of Levitt was invalid according to the law of Puerto Rico. Second, whether in fact, the "parties had agreed to a 'winner take all' disposition of their disputes" as alleged by Commercial. The controversy as to the last issue was framed through formal pleadings. Commercial, through its counter-complaint of September 15, 1978, specifically alleged that an agreement has been reached between the parties that the prevailing party would recover $34,000.00 plus interests from the other.

Levitt filed its answer to that counter-complaint where it denied the existence of said agreement, or "understanding".

No evidence was ever received, or requested, by the trial court when reaching its judgment in favor of Commercial as to this point. This Honorable Court, when reviewing the District Court's judgment, did not find in the record "Levitt's answer to this counter-complaint" and consequently felt that there was "solid basis" to support the appealed judgment.

On the contrary, there is nothing in the record besides the contradictory pleadings of both parties to enable the court to decide the controversy as to whether in fact that specific agreement had been reached.*

* Commercial specifically alleged that said "understanding was held in chambers before Honorable James T. Watson". (Paragraph 6 of the Counter-Complaint of Commercial). However, Commercial in this same suit represented to this court: "That

We have reviewed the record forwarded by the District Court on September 13, 1979, and it appears from the index certified by the Clerk that the answer of Levitt & Sons of Puerto Rico, Inc. to the counter-complaint of Commercial was forwarded to this Court as document No. 212 of the record on appeal. Furthermore, Levitt & Sons included its answer to the counter-complaint as Appendix D of the Reply Brief. Reference was made throughout the Reply Brief for the Appellant to that answer. Reference was also made, during oral argument, to said answer to the counter-complaint.

Levitt's answer to the counter-complaint of Commercial is decisive for this appeal inasmuch as due process requires that the factual allegations of Commercial against Levitt not be decided without evidence of some kind at a trial, or through a Summary Judgment proceeding. The proposition that the Due Process guarantee of the Fifth Amendment requires evidence before a court of the United States can enter any judgment, civil or criminal, requires no citation of authority.

WHEREFORE, it is respectfully requested that rehearing be granted and the judgment of the District Court be reversed.

Respectfully submitted,

DAVID RIVE-RIVERA
CALDERON, ROSA-SILVA & VARGAS
BOX 2219
Hato Rey, Puerto Rico 00919
Tel. 753-5050
Attorneys for Appellant

Commercial's attorney was not present at the Second settlement conference, held on February 18, 1977, when the alleged settlement was reached . . .", *Berrios Rivera* v. *Britsh Ropes Ltd.*, 575 F. 2nd. 966, 968 (1st Cir. 1978), that is, at the very same conference where the "winner-take-all" agreement was reached. Thus, if anything, the published precedent of this case stands in direct contradiction to Commercial's allegation.

APPENDIX G

Factual Background

The original plaintiff, Berrios Rivera, was injured when working as a carpenter for his employer Insular Construction Corp., at a housing development being built for Insular for petitioner Levitt & Sons of Puerto Rico, Inc., in San Juan, Puerto Rico. Insular, carried public liability insurance with respondent Commercial Insurance Company of Newark, New Jersey.

Berrios brought suit against the manufacturer of the rope and also against Harnischfeger Corporation, the manufacturer of the crane. The latter brought a third party action against Levitt. Levitt, then, brought a third party action against Commercial. The basis of this complaint was a hold harmless running from Insular to Levitt, which Levitt alleged was covered by the liability insurance policy of Commercial.

The District Court held that all the parties had reached a settlement agreement under which each of the four defendants had agreed to pay $34,000 to the plaintiff. Both Levitt and Commercial filed a joint appeal before the First Circuit in which they vigorously challenged the settlement agreement because neither of its counsel had been present at the settlement conference held on February 18, 1977 when the alleged settlement was reached. See *Berrios Rivera* v. *British Ropes, Ltd.*, 575 F. 2d 966, 968 (C.A. 1, 1978).

The Court of Appeals thought otherwise, and held that, as a matter of fact, the settlement agreement had been reached, and remanded the case to the district court so that the rights of Commercial and Levitt between each other would be decided there.

Commercial filed a "Counter Complaint" (Appendix D) against Levitt & Sons of Puerto Rico in which it alleged that an agreement was reached "in chambers before Hon. James T. Watson" to the effect that "if Commercial was successful in its

defense against the claim of Levitt, then Levitt would reimburse Commercial for the aforesaid sum of $34,000 plus interest that it pays". Levitt promptly filed its answer denying said pleading as "completely groundless". (Appendix E).

The controversy as to the last issue was, thus, framed through formal pleadings. No evidence was offered to the trial court by the parties as to this point in conflict. In spite of this fact the District Court entered judgment in favor of Commercial, holding that as a matter of fact Commercial and Levitt had reached a "winner-take-all" agreement. The Court of Appeals affirmed. A motion for rehearing (Appendix F) was duly filed raising this point in issue, but was denied. This petition for certiorari followed.

Supreme Court, U. S.
FILED
OCT 20 1980
MICHAEL RODAK, JR., CLERK

No. 80-133

In the Supreme Court of the United States

OCTOBER TERM 1980

LEVITT & SONS OF PUERTO RICO, INC.,
PETITIONER,

v.

COMMERCIAL INSURANCE COMPANY,
RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

CHARLES A. CORDERO
FRANCISCO J. COLON PAGAN
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(809) 724-5554 & 724-5754
Attorneys for Respondent

Blanchard Press, Inc., Boston, Mass.—Law Printers

QUESTION PRESENTED

Respondent disagrees with the question presented by Petitioner because it is misleading. The question should read as follows:

Whether the judgment rendered against the Petitioner, who waived its right to a trial by agreeing to submit its controversy with Respondent by briefs to the Court for Resolution, and is based on the entire file including the submitted briefs, violates the due process clause of the Fifth Amendment.

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In the
Supreme Court of the United States

OCTOBER TERM 1980

No. 80-133

LEVITT & SONS OF PUERTO RICO, INC.,
PETITIONER,

v.

COMMERCIAL INSURANCE COMPANY,
RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Respondent Commercial Insurance Company respectfully prays that the Writ of Certiorari requested by Petitioner Levitt & Sons of Puerto Rico, Inc. to review the Judgment and Opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on April 8, 1980 and an order on Petition for Rehearing entered April 30, 1980 be denied.

OPINIONS BELOW

The Opinion of the Court of Appeals of April 8, 1980 is unpublished (Lev. br Ap. A, pg 7).[1] A prior opinion of the Court of Appeals, relevant to issue raised in the Petition is reported *sub nom. Berrios Rivera* v. *British Ropes, Ltd.*, 575 F. 2d. 966 (Com br. Ap. A, pg. 8). the last opinion of the District Court is unpublished (Lev. br. Ap. C, pg 17).

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on April 8, 1980. A timely petition for rehearing was denied on April 30, 1980 (Lev. br. Ap B, pg. 15). This Court's jurisdiction is invoked under 28 USC 1254 (1).

COUNTER-STATEMENT OF THE CASE

This case neither involves a bizarre situation nor a clear violation of constitutional rights as to warrant review by this Court. It does involve a situation where petitioner waived its right to a trial by agreeing to submit for adjudication of a remaining controversy to the District Court by briefs. The matter was indeed submitted by briefs to the District Court who properly resolved the controversy against petitioner. Because petitioner's Statement of Fact is so incomplete and misleading, we have no alternative but to add and clarify some facts which were highly relevant in the resolution of the case below.

This is a diversity jurisdiction case that involves a personal injury claim against defendants British Ropes, Ltd., and Harnishfeger Corporation. A third party action seeking indemnity was filed against petitioner, Levitt & Sons of Puerto Rico, Inc.

[1] For the purposes of clarity we shall cite the documents contained in the appendix of this brief as (Com. br. Ap. pg. __) and the appendix added to Levitt's brief as (Lev. br ap. pg. __).

(Levitt). Levitt then filed an additional third party action against respondent Commercial Insurance Company (Commercial) also seeking indemnity because of the existence of a Hold Harmless Agreement in favor of Levitt. Thereafter, Commercial counter-claimed Levitt seeking recovery of the sums paid as a result of a settlement. Commercial pleaded there was an express agreement between Commercial and Levitt to the effect that the successful party would reimburse the other for the sums paid in the settlement.

On March 29, 1977, the District Court entered an order (Com. br. Ap. B. pg. 16), confirming a settlement agreement, wherein defendants, the third party defendant (Levitt), and the additional third party defendant (Commercial) all agreed to contribute the sum of $34,000.00 each to settle plaintiff's claim. Levitt and Commercial filed an appeal of that judgment on the grounds that a settlement had never been reached. The Court of Appeals held that a settlement was in fact reached, *Berrios Rivera* v. *British Ropes, Ltd.* 575 F. 2d. 966 (1st Cir. 1978). (Com. br. Ap. A, pg. 8). The Court of Appeals noted that Levitt and Commercial had retained the right to submit their cross claims to the District Court, 575 F. 2nd at 969, (Com. br. Ap. A, pg. 13). The case was returned to the District Court and it adjudicated the cross claims between Levitt and Commercial. Pursuant to its Opinion and Order of June 28, 1979 (Lev. br. Ap. C. pg. 17), judgment was entered in favor of Commercial compelling Levitt to reimburse Commercial the sums paid to plaintiff by Commercial as part of the overall settlement. Levitt then timely filed an appeal of that judgment. However, the Court of Appeals confirmed the judgment of the District Court. (Lev. br. Ap. A, pg 7).

The order of the District Court dated March 29, 1977, issued by Hon. Judge James Watson, stated:

> "Levitt and Sons of Puerto Rico, Inc. and Commercial Insurance Company of Newark, New Jersey agreed to submit for adjudication their claims against each other to this Court by briefs."

Levitt never moved the District Court for modification of that portion of said order, nor did Levitt ever raise that holding as an issue during the previous appeal to the Court of Appeals. It did for the first time on the last appeal.

On May 31, 1977, the District Court, Chief Judge Jose V. Toledo, issued an order (Com. br. Ap. C, pg. 18) confirming the settlement and specifically recognizing that Levitt and Commercial had agreed to submit for adjudication their claims against each other to the court by briefs.

Again, Levitt did not move for modification of that order, nor did it raise that point as an issue on appeal during the previous appeal.

The Court of Appeals, in its previous opinion, recognized that Commercial had reserved its right against Levitt, and made specific mention of the aforesaid order of May 31, 1977, stating that defendants were to file cross motions and memoranda regarding apportionment of damages between them; 575 F.2d at 968, (Com. br. Ap. A, pg. 12). It further noted that "they (Commercial & Levitt) retain the right to submit their claims against one another to the Court for judicial determination", 575 F. 2d at 969, (Com. br. Ap. A, pg. 13).

During oral argument of the previous appeal, Levitt never argued that there was any dispute over the agreement between Commercial and Levitt as to submitting the claims against one another to the court, nor did Levitt ever ask for reconsideration of the Court of Appeals' holding on that point.

At a chance meeting with Levitt's attorney, on or about August, 1978, Commercial first learned that Levitt's position was that Levitt was seeking recovery from Commercial, but

that Commercial was not seeking recovery from Levitt. Commercial promptly moved for an in chambers conference. As a result of that conference a counter-complaint (Lev. br. Ap. D, pg. 23) against Levitt was allowed wherein Commercial sought recovery of the $34,000.00 it paid as part of the overall settlement agreement. Paragraph four (4) of Commercial counter-complaint was admitted to by Levitt in its answer to counter-complaint (Lev. br. Ap. E, page 25); said paragraph reads:

> "4—That as part of the settlement it was accorded that the dispute between Levitt and Commercial would continue".

On June 28, 1979, the District Court, Hon. Chief Judge Jose V. Toledo, in a footnote, found that the record "reflects a clear inference that the agreement between Levitt and Commercial was one of winner take all, i.e. if Levitt's position were upheld Commercial would reimburse Levitt the $34,000.00, otherwise Levitt would reimburse Commercial $34,000.00. Hence, a judgement against Levitt was entered by the District Court. was one of "winner take all, i.e. if Levitt's position were upheld Commercial would reimburse Levitt the $34,000.00, otherwise Levitt would reimburse Commercial $34,000.00." (Lev. Br. App. C page 18). Hence, a judgment against Levitt was entered by the District Court.

PROCEEDINGS IN THE COURT OF APPEALS

The judgment was appealed to the United States Court of Appeals for the First Circuit. There, appellant "stressed" in only one paragraph of its brief that there was no basis in the record for the District Court to infer that the agreement between Levitt and Commercial was one of "winner take all". It alleged that the record was devoid of anything to sustain that inference even though a clear remark to that effect is contained in a District Court order and petitioner, in its answer to the counter-complaint filed by respondent, admitted the existence of said agreement.

The Circuit Court, in an unpublished opinion, correctly found that "there was solid basis" for the District Court's order against Levitt and upheld the judgment (Lev. br. Ap. A, pg. 7). Levitt then filed a Petition for Rehearing which was duly denied by the First Circuit (Lev. br.Ap. B, pg. 15).

REASONS FOR DENYING THE WRIT

It is unequivocally clear that there was an agreement between petitioner and respondent, with the consent of the District Court, to submit by briefs the controversy between them for resolution. Two District judges and the Court of Appeals for the First Circuit, on two different occasions, thoroughly reviewed the record and reached the same conclusion. There is nothing in the record which indicates that said agreement was never made.[2]

ARGUMENT

The case of *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960) is not applicable to the present case. In that case, a conviction was set aside by this Court because there was no evidence whatsoever of criminal misconduct. The present case, involves a civil case, not a criminal one, the parties agreed to submit the controversy to the Court by briefs, the briefs were in fact submitted and the Court resolved the controversy based on the whole record.[3]

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[2] It is obvious petitioner's claim of violation of due process is so frivolous that it constitutes bad faith and thus it should be ordered to pay attorneys' fees pursuant to *Alyeska Pipeline Service* v. *The Wilderness Society*, 421 U.S. 240 (1975)

[3] It should be noted that petitioner had filed a petition for Summary Judgment against respondent requesting, as a matter of law, a partial judgement in its favor because there was no fact issue in controversy.

The Court of Appeals assumed, in disposing of this case, that Levitt had denied the existence of the agreement in its Answer to Counter-Complaint. However, upon examining said answer (Lev. br. Ap E, pg. 25) we find that they did admit the existence of the agreement. The facts speak for themselves.

It is obvious that the Courts below fully considered and correctly decided the issues, that petitioner's argument is without merit, whether or not the decisions below were correct, that the issues are not important enough to warrant review, and the questions presented were not raised or preserved below, or were waived. Each and every one of these reasons, by themselves or in toto, are sufficient to deny the petition.

We must remember that Petitioner never requested a review by this Court of the prior decision of the Court of Appeals upholding the existence of an agreement. Hence, petitioner is stopped from challenging now that prior decision because it is and should be considered the law of the case.

In conclusion, petitioner's contention is merely that this Court negate an agreement voluntarily entered by petitioner waiving its right to a jury because the final judgment was contrary to its own interests.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied and petitioner should be assessed appeal costs and attorneys' fees.

Respectfully submitted,
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APPENDIX A

United States Court of Appeals

For the First Circuit

No. 77-1257

JOSE BERRIOS RIVERA, etc.,

PLAINTIFFS, APPELLEES,

v.

BRITISH ROPES LTD., et al.,

DEFENDANTS, APPELLEES,

v.

HARNISCHFEGER CORPORATION,

DEFENDANT AND THIRD PARTY PLAINTIFF, APPELLEE,

v.

LEVITT & SONS OF PUERTO RICO, INC.,

THIRD PARTY DEFENDANT, APPELLANT,

v.

COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY,

ADDITIONAL THIRD PARTY DEFENDANT, APPELLEE.

No. 77-1258

JOSE BERRIOS RIVERA, etc.,

PLAINTIFFS, APPELLEES,

v.

BRITISH ROPES LTD., et al.,

DEFENDANTS, APPELLANTS,

v.

HARNISCHFEGER CORPORATION,

DEFENDANT AND THIRD PARTY PLAINTIFF, APPELLEE,

v.

COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY,

ADDITIONAL THIRD PARTY DEFENDANT, APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[HON. JOSE V. TOLEDO, *U.S. District Judge*]

Before

CAMPBELL, BOWNES & MOORE,*

Circuit Judges.

Charles A. Cordero, with whom *Ramon Humberto Vargas* was on brief, for appellants.

Jaime Pieras, Jr., for appellee Harnischfeger Corporation.

Gabriel Hernandez Rivera, with whom *Feldstein, Gelpi & Hernanadez* was on brief for plaintiffs, appellees.

May 8, 1978

MOORE, *Circuit Judge:*

In this personal injury action, jurisdiction over which is based on diversity between the parties, plaintiff, who was rendered a paraplegic when a cable on a crane snapped, finally succeeded in this action, after three years of discovery and numerous postponed trial dates, to obtain a settlement from the defendant British Ropes, Ltd. (the cable manufacturer) and Harnischfeger Corporation (the crane manufacturer), joined by third-party defendant Levitt & Sons of Puerto Rico, Inc. (the prime contractor) (Levitt) and additional third-party defendant Commercial Insurance Co. (the liability insurer of the subcontractor, Insular Construction Company). The settlement, according to the district judge, was agreed to after a motion to dismiss based on *res judicata* was denied, and after months of settlement negotiations. An order was entered on March 29, 1977 in the sum of $136,000 to be distributed in equal sums of $34,000 among the four co-defendants and third-party defendants. The settlement order included a provision for compensation due to plaintiff's attorney and

---

* Of the Second Circuit, sitting by designation.

provisions pertaining to amounts to be paid to plaintiff's six minor children, who claimed derivatively against the defendants; these amounts had been approved by the court and by the Department of Justice of the Commonwealth of Puerto Rico, which filed its approval papers on February 18, 1977.

After the settlement order was entered on March 29, the co-defendant British Ropes filed a motion for reconsideration on April 7, alleging that its share of the settlement was only $30,000. On April 12, the court, over plaintiff's objections, entered an order reducing the contribution of British Ropes to the amount it claimed was due from it. Thereafter, on April 20, Commercial Insurance, which reserved the right, when settlement was entered, to have its third-party dispute with Levitt determined by the court (see Order dated May 31, 1977, Appendix at 48-53), filed a motion alleging that "in view of the 'chipping' tactics" of British Ropes, the order of March 29 should be vacated, and the case should be set for trial. On the same day that Commercial filed its motion, defendant Harnischfeger filed a "Motion Executing Settlement", stating that, in order to satisfy' plaintiff's objections to the reduction of the total amount paid to him and his children, it (Harnischfeger) agreed to increase its share of the settlement to $38,000, and thereby cure the deficiency. Harnischfeger's papers impressed upon the court that there had, in fact, been an agreement, and that the motion of Commercial was untimely since it was filed well after the time period, commencing with the filing of the March 29 order of settlement, permitted by the rules for contesting the judgment.

On April 22, 1977, the district court denied the motion of Commercial and held that the grievance would be cured by entering an order reapportioning the liabilities of all of the defendants: British Ropes was to pay $30,000; Harnischfeger, in conformance with its motion would be liable

for $38,000, and Commercial and Levitt were both to be held to $34,000 each, as per the March 29 order.

On April 27, Levitt filed a motion "withdrawing its offer of settlement"; the next day, Commercial and Levitt filed separate notices of appeal from the March 29 order and from subsequent orders affecting that order. That same day, Commercial filed a motion for reconsideration and to vacate the settlement orders. Although the district court found itself without jurisdiction to consider the motion to vacate since the notice of appeal had been filed, Chief Judge Toledo, in an opinion dated May 31, 1977, chronicled the events that occurred subsequent to the filing of the notices of appeal and noted that, had he retained jurisdiction, he would have denied the motion to vacate.

As a first ground of appeal, appellants Commercial and Levitt urge that the orders of March 29 and April 22 (modifying the settlement), and all subsequent orders affecting the settlement issue, should be reversed on the ground that no settlement had in fact been reached, appellants major contention is that Commercial's attorney was not present at the second settlement conference, held on February 18, 1977, when the alleged settlement was reached, and that no formal releases or stipulations for judgment were ever drafted by the parties' attorneys, all of which, they argue, indicates that there was never an agreed-upon settlement in the first instance. Appellants claim that, at the settlement conferences, there was only an agreement to *recommend* settlement in four equal shares to the various parties, but that the district judge erred in entering the settlement orders because there was no true consent.

Plaintiff-Appellee objects to the tactics of the appellants/third-party defendants, pointing to specific representations of those parties in their motion papers acknowledging that there had been agreement to pay $136,000 to the plaintiff. Indeed, the docket entry for February 18, 1977 recites that a settlement conference was called, that the settlement of

the minors' claims was approved pursuant to the Certificate of Approval of the Department of Justice of the Commonwealth of Puerto Rico, and that defendants were to file cross motions and memorandam regarding apportionment of damages be tween them. Furthermore, plaintiff refers to a motion filed by appellant Levitt on May 3, 1977, entitled "Motion for a Special Hearing and Further Proceedings Consistent with Settlement Agreement", in which Levitt stated that there had been specific agreement that it would share in the liability to the extent of $34,000.

We are persuaded that the settlement orders must be upheld. First, in our task of reviewing the findings and orders of the district court, we must presume regularity, and give due regard to the district judge's proximity to the situation. Second, it is the burden of the appellants to demonstrate that the ruling of the district court was erroneous, and the factual finding underlying the judgement—*i.e.*, that there was an agreed settlement—cannot be set aside unless it is "clearly erroneous". Fed.R.Civ.P. 52(a). We think that in this case, appellants Commercial and Levitt have not met their burden, and we thus cannot say that the district court erred in sustaining the settlement. Indeed, the facts in the record support this conclusion: first, appellants were served with plaintiff's motion of February 15, 1977 for approval of the settlement of the claim of the minor children, and were later served with an order dated February 18 approving the settlement and directing them to file cross motions and memoranda. The circumstances clearly indicate that a settlement had been reached; if there was none, it is at least unusual that no objections were made at this time. Second, we note that the appellants in this case are Levitt and Commercial,[1] *neither* of whom

[1] It is noteworthty that Levitt, in its motion dated May 3, 1977, specifically referred to the "settlement agreement" earlier reached and Commercial, in its motion of April 20, also alluded to the settlement in the sum of $136,000.

was affected by the court's order modifying the distribution of payments; further, they retain the right to submit their claims against one another to the court for judicial determination. Third, neither of the appellants found any reason to complain prior to the timely motion for reconsideration made by British Ropes, which is not a party to this appeal; indeed, Commercial's motion to vacate the March 29 settlement order was not filed until April 20, and it was not predicated on the ground that no settlement had been reached, but was rather an objection to the "chipping tactics" of British Ropes; if this was a ground for grievance as to appellants, it was cured by defendant Harnischfeger's willingness to pay $4,000 more than it had originally agreed to do.

Finally, we think that the record shows an independent reason for appellants' attempt to relieve themselves of their settlement obligations: According to the Motion of defendant Harnischfeger dated May 11, 1977, opposing the motion of appellants to withdraw their "offers" of settlement it appears that there was a decision by the Supreme Court of Puerto Rico rendered in April, 1977—the month after the settlement order of March 29 was entered—in which the court discussed the obligations "of owners as to the employees of their contractors and sub-contractors". (See Appendix at 34, Informative Motion of Harnischfeger.) As Harnischfeger pointed out, it is not unlikely that that decision, which might have had some effect in a diversity case, may well have entered into the attempts of the contractor and insurer for the sub-contractor to seek more favorable terms by forcing the issues to trial. However, once bound by a settlement given court appoval, these litigants should not be permitted to escape their obligations to plaintiff. Again we note that the appellants retain the right to submit their cross claims to the court; thus, if the controlling law has shifted their liabilities, the district court will so determine. However,

their obligations to the plaintiff should not be disturbed under the circumstances.

Although the underlying issue is the validity of the settlement, appellants devote the major portion of their appellate arguement to the propriety of the district court's refusal to dismiss the action on grounds of *res judicata*. The motion to dismiss was precipitated by virtue of the fact that plaintiff, concurrently with commencing the federal action against these defendants, brought an identical action in the Commonwealth courts. Some of the defendants never filed an answer in that court action. The Commonwealth court once dismissed the action for lack of prosecution, but reinstated it on plaintiff's motion. Thereafter, since the suit remained dormant, the court again dismissed the action under Rule 11 of the Administrative Rules for the Court of First Instance of Puerto Rico, which provides:

> "The judge in charge of administrative matters . . . shall dismiss, and order the entry of the dismissal judgment, of all civil matters pending in which there has been effected no action by any of the parties during the past six (6) months. . . .A dismissal under this rule shall constitute res judicata."

Plaintiff never appealed this dismissal since, by the time it was entered, the federal action was well under way. However, when Commercial was brought into the action by way of a third-party complaint, it moved for dismissal on *res judicata* grounds. The motion was denied, and the denial was reaffirmed on reconsideration, on the ground of lack of timeliness and on the ground that, under the controlling law of Puerto Rico, the defense was not to be allowed if to do so would permit an injustice.

Although appellants contest the propriety of the district court's refusal to apply *res judicata* in the instant case, we think that the decision is wholly supportable by Puerto

Rican law, amply documented by the district court. We of course, give weight to the district judge's analysis of the local law with which, as a member of the bar of Puerto Rico, he is especially familiar. *Graffals Gonzalez* v. *Garcia Santiago*, 550 F.2d 687, 688 (1st Cir. 1977); C. Wright, *Law of Federal Courts* 271 (3rd ed. 1976). *See, also, Bernhardt* v. *Polygraphic Co.* 350 U.S. 198, 204-05 (1956) (decision of local federal judge on question of local law to be given special weight); *accord, Sauerhoff* v. *Hearst Corp.*, 538 F.2d 588, 591 (4th Cir. 1976); *Lomartira* v. *American Automobile Insurance Co.*, 371 F.2d 550, 554 (2d Cir. 1967); *but see, Luke* v. *American Family Mutual Insurance Co.*, 476 F.2d 1013, 1019-20 (8th Cir.), *cert. denied*, 414 U.S. 856 (1973) (although special weight given, circuit court is not bound). We believe that Chief Justice Toledo reached a correct interpretation of the law of Puerto Rico on this point. The courts of Puerto Rico have recognized that in certain cases, the policies of *res judicata* are not well served by literal application of the procedural rules of the courts. In the case at bar, defendants were not, in fact, put to the task of responding to multiplicitous suits: they did not even plead in the state action, and were well aware, it seems, that the federal action was being actively litigated. Their right, protected by the doctrine of *res judicata*, not to be harassed by successive litigation was simply not involved in this instance.

The district court correctly recognized this point, and properly found that an injustice would be worked were dismissal of plaintiff's federal suit to be permitted.

The judgment of the district court is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 528-73

JOSE BERRIOS RIVERA, for himself and on behalf of his minor children, Jose Israel, Celys Yolanda, Frank Reinaldo, Luis Armando, Carmen Beatriz and Lydia Enid Berrios

PLAINTIFF

v.

BRITISH ROPES, LTD., etc.

DEFENDANTS

v.

HARNISCHFEGER CORPORATION

DEFENDANT AND THIRD PARTY PLAINTIFF

v.

LEVITT & SONS OF PUERTO RICO, INC.

THIRD PARTY DEFENDANT

v.

COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY

ADDITIONAL THIRD PARTY DEFENDANT

ORDER

At the settlement conferences held in the Judge's chambers on February 1st, and February 18th, 1977, the parties agreed to settle this action for the total sum of One Hundred Thirty Six Thousand Dollars ($136,000.00) to be paid to the plaintiff as follows:

Jose Berrios Rivera	$124,000.00
Jose Israel Berrios (minor)	2,000.00
Celys Yolanda Berrios (minor)	2,000.00
Frank Reinaldo Berrios (minor)	2,000.00
Luis Armando Berrios (minor)	2,000.00
Carmen Beatriz Berrios	2,000.00
Lydia Enid Berrios (minor)	2,000.00
	$136,000.00

and the defendants agreed to pay the total settlement amount as follows:

British Ropes, Ltd.	$34,000.00
Harnischfeger Corporation	$34,000.00
Levitt & Sons of P. R., Inc.	$34,000.00
Commercial Insurance Co. of Newark, N.J.	$34,000.00
	$136,000.00

Levitt and Sons of Puerto Rico, Inc., and Commercial Insurance Company of Newark, New Jersey agreed to submit for adjudication their claims against each other to this Court by briefs.

Due deliberation having had on the above agreements, it is now,

ORDERED that the following defendants pay JOSE BERRIOS RIVERA and his attorneys FELDSTEIN, GELPI, TORO & HERNANDEZ the sum of $136,000.00 as follows:

British Ropes, Ltd.	$34,000.00
Harnischfeger Corporation	$34,000.00
Levitt & Sons of P. R.,Inc.	$34,000.00
Commercial Insurance Co. of Newark, N.J.	$34,000.00
	$136,000.00

and it is further,

ORDERED that in compliance with this Court's order of February 18, 1977 JOSE BERRIOS RIVERA shall pay the law firm of FELDSTEIN, GELPI, TORO & HERNANDEZ the sum of $3,960.00 for work performed on behalf of the six (6) minors, and it is further,

ORDERED that in compliance with the aforesaid order, JOSE BERRIOS RIVERA shall use the sum of $8,040 from the total settlement paid to him for the sole use and benefit of said minors.

San Juan, Puerto Rico, this 29th day of March, 1977.

/s/ JAMES WATSON
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Civil No. 528-73

JOSE BERRIOS RIVERA, ETC., ET AL,

PLAINTIFFS

v.

BRITISH ROPES LTD., ET AL,

DEFENDANTS

v.

HARNISCHFEGER CORPORATION,

DEFENDANT AND THIRD PARTY PLAINTIFF

v.

LEVITT & SONS OF PUERTO RICO, INC.,

THIRD PARTY DEFENDANT

v.

COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY,

ADDITIONAL THIRD PARTY DEFENDANT.

ORDER

After the parties had informed the Court that a settlement had been reached in the present case, judgment was entered on March 29, 1977 in the sum of $136,000.00 to be distributed in equal sums of $34,000.00 bv the four codefendants and third party defendants. Thereafter, on April 7, 1977, codefendant British Ropes Ltd. filed a motion for reconsideration alleging that its share of the settlement was only $30,000.00. On April 12, 1977, the Court entered an Order reducing the contribution of British Ropes to $30,000.00. Commercial Insurance Company of Newark, New Jersey, thereafter filed a motion alleging that "in view of Civil No. 528-73 the tactics of British Ropes Ltd.," it would only pay $30,000.00 of the settle-

ment judgment. On April 22, 1977, Harnischfeger Corporation filed a motion agreed to by plaintiffs to the effect that it would pay $38,000.00 instead of $34,000.00.

On April 22, we issued an Order denying Commercial's motion as untimely and because the grievance alleged had been cured by the fact that Harnischfeger had assumed the obligation to pay the difference of $4,000.00.

On April 27, 1977, Levitt & Sons of Puerto Rico, Inc. filed a motion withdrawing its offer of $34,000.00 in settlement. On April 28, 1977, Commercial Insurance and Levitt & Sons filed separate notices of appeal informing the Court that they were appealing to the United States Court of Appeals for the First Circuit from the Order of March 29, 1977 and from the subsequent orders of the Court affecting or in regard, to said Order of March 29. On that same date (April 28, 1977), Commercial filed a motion for reconsideration and to vacate orders urging for the vacation of this Court's Orders of March 29, April 12, April 22 and April 26. In this motion attorney for Commercial states that he was not present at the settlement conference held on February 18, 1977 and referred to in the judgment of March 29, 1977. We are urged by Commercial to reconsider said orders notwithstanding the fact that a notice of Appeal has been filed, alleging that under Rule 60(a) of the Federal Rules of Civil Procedure we retain jurisdiction to correct any errors in the judgment before the appeal is docketed in the appellate court.[1] On May 11, 1977, Harnischfeger filed an informative motion and an opposition to Levitt's withdrawal of offer wherein it stated its view that a settlement had in fact been reached and that it was legally binding. On May 19, 1977

[1] Following the chronological statement of events, on May 4, 1977 Levitt & Sons filed a motion requesting a Special Hearing and further proceedings consistent with the settlement agreement wherein it requested a hearing for the litigation and adjudication of Levitt's cross claim against Commercial. This hearing was set for June 3, 1977 at 9:30 a.m.

plaintiffs filed a motion in response to codefendants' various motions wherein it requested the Court to deny the motions filed by Commercial and Levitt & Sons. Finally, on May 19, 1977, Commercial filed a reply to Harnischfeger's motion dated May 11.

It seems to us that the above sequence of events, although giving an impression of complexity and dubiousness, are all dependent upon one central question: whether a settlement agreement was reached upon to give way to the Order of March 29, 1977. Regretfully, the settlement conferences referred to in the Order of March 29, 1977 were not conducted under the supervision of the undersigned judge. However, the same were conducted by the Hon. James L. Watson and an Order was signed to said effects. Thereafter, upon British Ropes' motion seeking a reduction of its contribution from $34,000.00 to $30,000.00, Judge Watson granted the same. Thereafter, the undersigned judge intervened by issuing an order approving of the reapportionment of contribution whereby Harnischfeger agreed to pay the additional $4,000.00.

Although none of the parties have so argued, in order for the Order of March 29, 1977 be null some irregularity must have taken place. No one has so stated and we will not so assume, in absence of any allegation on evidence to that effect. The Honorable Judge Watson presided over said settlement conferences and the fact that attorney for Commercial was not present at the meeting of February 18, 1977, does not preclude the possibility that his agreement to pay $34,000.00 was obtained at a previous meeting held on February 1, 1977. In any event, we have to presume the validity of said settlement and of the Order issued on March 29, 1977 in the absence of any evidence to the contrary.

We further find that from those settlement conferences as they are reflected on the documents in the record of this case the only issue as to the terms of the settlement was the amount

to be finally paid by British Ropes which issue was solved by the Order of Judge Watson reducing said contribution to $30,000.00.

In this case there was a settlement agreement to end a judicial proceeding, as such, it is a contract of compromise as that provided for by the Puerto Rico Civil Code, Title 31, Laws of Puerto Rico Annotated, Section 4821 et seq. See in this regard *Diaz Torres* v. *Rivera*, 96 P.R.R. 548 (1968).

Section 4828 of Title 31 of Laws of Puerto Rico Annotated, provides:

> "A compromise, in which error, deceit, violence, or forgery of documents is involved, shall be subject to the provisions of section 3404 (stating when consent is void) of this title.
>
> Nevertheless, one cf the parties cannot set up an error of fact against the other, if by reason of a compromise, the latter has withdrawn from a suit already begun."

In the present case there was no error or if there was it was cured by Judge Watson's second order and no allegation of deceit, violence or forgery, and more important by the settlement order of March 29, 1977 a suit already begun, and set for trial, was avoided.

Further, it has been held that a doubtful claim, that is, one in which a party could possibly end up paying more than it should or paying when it was not bound by law to pay, is sufficient to support a settlement agreement. *McCormick* v. *McCormick*, 52 P.R.R. 669 (1938). It should be borne in mind that the consideration of a settlement contract, or compromise, is the avoidance of the provocation of a suit or the termination of one that has already been instituted. See Title 31, Laws of Puerto Rico Annotated, Section 4821. We find such consideration here, and the fact that the claim was later rendered dubitable by an opinion of the Supreme Court should have no bearing on the validity of said settlement agreement.

We are told by Commercial that we have jurisdiction over the present case under Rule 60(a) of the Federal Rules of Civil Procedure. However, said rule pertain to clerical errors and, as such, it is not the proper vehicle to obtain a change of a substantive ruling as that sought by movant herein. *Gilroy* v. *Erie Lackawana R. Co.*, 44 F.R.D. 3 (DC N.Y., 1968). We therefore find ourselves without jurisdiction inasmuch as said order of March 29, 1977 is appealed to the Circuit Court. However, we have chosen to analyze the issue in the preceding pages and hereby certify to the Court of Appeals that, had we retained jurisdiction, we would have *denied* Commercial's and Levitt's motions for the above stated reasons.

There is however an error in this case which is correctable by us at the present moment under the above mentioned Rule 60(a). That is our Order of April 26, 1977, whereby we rendered as moot the controversy between Commercial and Levitt. The vacation of such order is not a change of a prior substantive ruling. Our determination of mootness in our Order of April 26, 1977, was a regrettable oversight of the terms of the Order of March 29, 1977, whereby Levitt and Comercial had "agreed to submit for adjudication their claims against each other to this Court by briefs".

Wherefore, in view of the foregoing, our Order of April 26, 1977 holding as moot the controversy between Levitt and Commercial, is hereby vacated. The record of this case shall be remitted to the Court of Appeals so that the appeal of the same is perfected.

IT IS SO ORDERED.

San Juan, Puerto Rico, May 31, 1977.

JOSE V. TOLEDO
Chief U.S. District Judge

Supreme Court, U. S.
FILED
OCT 29 1980
MICHAEL RODAK, JR., CLERK

No. 80-133

In the Supreme Court of the United States

OCTOBER TERM, 1980

LEVITT & SONS OF PUERTO RICO, INC.,
PETITIONER,

v.

COMMERCIAL INSURANCE COMPANY,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONER

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In the
Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-133

LEVITT & SONS OF PUERTO RICO, INC.,
PETITIONER,

v.

COMMERCIAL INSURANCE COMPANY,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONER

RESPONSE TO BRIEF IN OPPOSITION

Commercial's essential claim in its brief is that Levitt "waived its right to a trial by agreeing to submit for adjudication the remaining controversy by briefs". This assertion is based on an order of the District Court of March 29, 1977, that was challenged on appeal by Commercial.

Such order issued by the Hon. District Judge James T. Watson stated that at the settlement conferences held in his chambers, the parties settled with the plaintiffs, and that Levitt and Commercial agreed to submit for adjudication their claims against each other by briefs. (Respondent's brief in opposition, Appendix B, Pg. 16).

This order has nothing to do with the issue before this court.

The case is brought for review here because, after a joint appeal filed by Commercial and Levitt, the former filed a counter-complaint on September 15, 1978 alleging that not only would the "dispute" between Levitt and Commercial continue, but that an agreement had been held in chambers before Hon. James T. Watson that "if Commercial was successful in its defense against the claim of Levitt, then Levitt would reimburse Commercial for the aforesaid sum of $34,000 plus interest that it paid". (Commercial's Counter-Complaint against Levitt & Sons of Puerto Rico, Appendix D of the petition for Certiorari, at pg. 23).

This allegation was formally denied by Levitt. (Appendix E of the Petition for Certiorari, page 25). The court, without holding any evidentiary hearing as to this controversy, entered judgment against Levitt for $34,000 because it found that as a matter of fact such an agreement had taken place. That the judgment against Levitt was entered because of this finding of fact is acknowledged in Respondent's brief in opposition at page 4.

Levitt never waived its right to bring evidence as to this critical point. There is nothing in the record to support Commercial's assertion that, after this new factual allegation was introduced in Commercial's counter-complaint, Levitt waived in any manner the right to controvert this factual pleading upon which this case rests.

The superintending power of this court is requested, not because there is an important question of federal law involved, but because the rights of the petitioner were decided without

an opportunity to controvert the opposing party allegations, and because the Court of Appeals, even though acknowledging such travesty, affirmed it.*

Respectfully submitted,

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Attorney for Petitioner

* If Levitt is granted the right to a hearing it will bring to the attention of the court Commercial's representation to the First Circuit that it was not present at the meeting where the alleged settlement was reached, and where as subsequently Commercial alleged, a "winner-take-all" agreement was executed. (Consolidated Brief of Commercial and Levitt, Appendix A of this Reply Brief). "Appellant's major contention is that Commercial's attorney was not present at the second settlement conference held on February 18, 1977, when the alleged settlement was reached . . ." *Berrios Rivera* v. *British Ropes Ltd.*, 575 F.2d 966, 968 (C.A. 1, 1978).

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 77-1257

JOSE BERRIOS RIVERA, ETC.,
PLAINTIFFS, APPELLEES,
v.
BRITISH ROPES LTD., ET ALS.,
DEFENDANTS, APPELLEES,
v.
HARNISCHFEGER CORPORATION,
DEFENDANT AND THIRD PARTY PLAINTIFF, APPELLEE,
v.
LEVITT & SONS OF PUERTO RICO, INC.,
THIRD PARTY DEFENDANT, APPELLANT,
v.
COMMERCIAL INSURANCE COMPANY
OF NEWARK, NEW JERSEY,
ADDITIONAL THIRD PARTY DEFENDANT, APPELLEE.

No. 77-1258

JOSE BERRIOS RIVERA, ETC.,
PLAINTIFFS, APPELLEES,
v.
BRITISH ROPES LTD., ET ALS.,
DEFENDANTS, APPELLEES,
v.
HARNISCHFEGER CORPORATION,
DEFENDANT AND THIRD PARTY PLAINTIFF, APPELLEE,
v.
COMMERCIAL INSURANCE COMPANY
OF NEWARK, NEW JERSEY,
ADDITIONAL THIRD PARTY DEFENDANT, APPELLANT.

---

* * *

[4] *Statement of Facts Relevant to the Issue That a Settlement Had Been Effected.*

On February 1, 1977, the attorneys for all parties met in chambers with Honorable James L. Watson, a visiting judge sitting by designation, for a settlement conference. At that meeting all parties agreed to *recommend* to their respective clients settlement of plaintiff's claim in the sum of $136,000.00, to be paid in equal sums of $34,000.00 by each of the clients represented, to wit, British Ropes, Harnischfeger, Levitt, and Commercial (A.14). The parties further agreed to report to the Court, and *three* of the attorneys met with the Court below on February 18, 1977, to again discuss settlement. At the February 18, 1977 conference, attorney for Commercial was not present (A. 39 fn. 2).

On March 29, 1977, the Court below issued its order stating, "the parties agreed to settle this question for the total sum of $136,000.00 to be paid to plaintiff . . ."

On April 7, 1977, British Ropes requested reconsideration on the grounds that it had only agreed to make a $30,000.00 settlement (A. 16). On April 12, 1977, the Court granted reconsideration and stated:

> "Contribution of British Ropes, Ltd., to settlement shall be $30,000.00". (A. 16).

[5] On April 12, 1977, plaintiff opposed the reconsideration requested by British Ropes claiming that:

> "No formal notice was given to the undersigned (plaintiff's attorney) attorney at the conference held on February 18, 1977, by co-defendant, British Ropes, Ltd., that their contribution would be only $30,000.00 . . ." (A. 20).

On April 20, 1977, Commercial mailed the Court its motion to vacate the March 29, 1977 Order, (filed April 22, 1977, 8:30 A.M.), since all parties had agreed to *recommend* settlement in equal shares, and it opposed the "chipping" tactics of British Ropes. (A. 21, 22). This motion was denied by Honorable Judge Toledo on April 27, 1977. On April 26, 1977, Levitt also petitioned for a vacation of the March 29, 1977 Order, since it was evident that at the settlement conference on February 18, 1977, no settlement of the matter was reached. (A. 29, 30).

From the above is is clear that plaintiffs, British Ropes, Levitt, and Commercial had not reached an accord, or a meeting of the minds, and in one form or another had objected to the March 29, 1977, "settlement" Order issued by the Court.

In the interim, on April 22, 1977, at 4:05 P.M., Harnischfeger filed a "Motion Executing Settlement" with the Court below wherein Harnischfeger, with plaintiff's consent, requested that the March 29, 1977, and April 12, 1977 Orders remain in force *with the exception that Harnischfeger be allowed to increase its contribution from $34,000.00 to $38,000.00,* to cover the $4,000.00 difference, which British Ropes had refused to pay. (A. 23, 24). With remarkable speed, forty-five minutes later, the Court below, (Honorable Judge Toledo), entered its two page Order granting the motion of Harnischfeger, and [6] re-apportioned the sums to be paid by each of the defendants. The Order also erroneously states that:

> "On April, 1977, Commercial Insurance Company of Newark, New Jersey, filed a motion alleging that in view of the tactics of British Ropes, Ltd., it will only pay $30,000.00 of the settlement judgment." (A. 25)[1]

[1] This is obviously in error. Although the Court does not insert the date in April, 1977, that Commercial filed its motion, the Court is obviously referring to Commercial's "Motion to vacate the order of the Court". dated April 20, 1977, and filed on April 22, 1977, at

On April 28, 1977, Commercial and Levitt timely filed notices of appeal of the March 29, 1977 Orders, and subsequent Orders of this Court. The Orders of the Court resolving that a settlement had been effected, and subsequent entry of judgment therein, presents the second issue for review by this Honorable Court.

* * *

[14] II. THE COURT BELOW ERRED IN HOLDING THAT A SETTLEMENT HAD BEEN REACHED, WHERE THREE OF THE PARTIES DISAGREED AS TO THE ALLEGED SETTLEMENT, AND ONE OF THE PARTIES WAS NOT EVEN PRESENT AT THE SETTLEMENT CONFERENCE.

The series of events as set forth in the statement of the case makes it amply clear that there was never any meeting of the minds as to the crucial issue of whether or not a settlement had been reached. Clearly, there was never any settlement.

Indeed, the second settlement conference was not attended by Commercial and during the time between said second settlement conference (February 18, 1977) and the March 29, 1977 Order of the Court, the parties never met to draft releases, or draft any formal stipulation for judgment as is usual in these types of cases. No formal or [15] informal consent was given by Commercial as to the settlement and it objected to the settlement. British Ropes objected to the amount it was ordered to pay; the plaintiff objected to a reduction in the amount it was to receive, and Levitt left the conference believing that a settlement had not been reached. It is obvious that the reason there were no formal meetings between the parties to prepare the usual stipulations was because all parties felt there had not been a settlement. The only agreement ever

---

8:30 A.M. In its motion, Commercial *never* indicated it was agreeable to paying any sums, but asked that the March 29, 1977 Order be vacated and allow the case to proceed to trial. (See A. 21). It appears the Court's error was caused by Harnischfeger's motion which contains the exact same error. (see A. 23).

reached was a preliminary understanding between the attorneys on February 1, 1977, to *recommend* to their clients a settlement of $136,000.00 to be divided in four (4) equal shares. Clearly, the second settlement conference did *not* reach agreement between the parties.

Rather, it appears that on or about April 22, 1977, plaintiff and Harnischfeger reached a private accord for settlement *on that date*, and thereafter, moved the Court to overrule the objections filed by the other parties. Certainly, the private accord between plaintiff and Harnischfeger could not bind Levitt and Commercial, appellants herein.

Under local law, 31 L.P.R.A. 3391, there is no contract if the consent of a party is not given, and consent requires an offer, and an acceptance of the offer, 31 L.P.R.A. 3401. The consent is null, if there has been an error that affects the substance of the contract, 31 L.P.R.A. 3404, 3405. A settlement or compromise is a *contract* where the parties *giving, promising,* or *retaining something,* avoid the commencement of a suit or otherwise terminate an active suit, 31 L.P.R.A. 4821. As a matter of fact, a settlement can be rescinded, if one of the parties is unaware of a final judgment at the time the parties accord a settlement, 31 L.P.R.A. 4830.

In the case at bar, the clear consent, promise and accord of several parties is missing.

[16] The Court below, (Honorable Judge Toledo) acknowledges that the sequence of events leading toward settlement gives the impression of "complexity and dubiousness"(A. 50). The Court also acknowledged that after the March 29, 1977 Order, British Ropes moved the Court "for a reduction in its contribution from $34,000.00 to $30,000.00, (which) Judge Watson granted . . . ." (A. 50). Notwithstanding the lack of consent, the Court held that

> "in order for the Order of March 29, 1977 (to) be null some irregularity must have taken place. . . ." and that, "in any event, we have to presume the validity of said settlement and of the Order issued on March 29, 1977 in the absence of any evidence to the contrary."

Thus, the Court below in one full sweep held that, since there was no fraud or other irregularity, a settlement was concluded even though,

(a) there was no consent by one or more of the parties, and

(b) the sequence of events gave the impression of "complexity and dubiousness", and

(c) several parties after the March 29, 1977 Order, objected to the settlement, and,

(d) the plaintiff and Harnischfeger held a private accord on or about April 22, 1977 to settle the problem caused by the Court's reduction of the amount to be paid by British Ropes.

Under such circumstances, it is clear error for the Court below to hold that a judgment has been effected.

[17] CONCLUSION

The Order of the Court below dated December 16, 1976, and entered on December 21, 1976, denying the motions of Commercial and Harnischfeger to dismiss on the basis of Res Judicata should be reversed with directions to enter jidgment dismissing the complaint, otherwise the alternative remedy should be granted, ordering the vacation of the March 29, 1977 Order, with instructions for the proceedings to continue.

Respectfully submitted,

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